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Comment

MARYLAND'S CONSUMER PROTECTION ACT: A PRIVATE CAUSE OF ACTION FOR UNFAIR OR DECEPTIVE TRADE PRACTICES

INTRODUCTION

Consumers seeking to recover for damages caused by sellers' false and misleading statements have had considerable difficulty establishing the elements of the two theories traditionally available to them, tort actions for deceit¹ and contract actions for breach of express and implied warranties.² An element of the common law action of deceit is scienter, knowledge of the falsity of the statement.³ Moreover, even if a consumer is able to prove the

1. Under Maryland law in an action for deceit a plaintiff must establish five elements: (1) that a representation made by the defendant was false; (2) that either its falsity was known to the defendant or the misrepresentation was made with such reckless indifference to truth as to impute knowledge to him; (3) that the misrepresentation was made for the purpose of defrauding the plaintiff; (4) that the plaintiff not only relied upon the misrepresentation but had the right to rely upon it with full belief in its truth, and that he would not have done the thing from which damage resulted if it had not been made; and (5) that the plaintiff suffered damage directly resulting from the misrepresentation. *Appel v. Hupfield*, 198 Md. 374, 378, 84 A.2d 94, 95-96 (1951); *Gittings v. Von Dorn*, 136 Md. 10, 109 A. 553 (1920). The requirement of purpose to defraud appears to be contrary to the general rule that intent to injure the plaintiff is not required. See *James & Gray, Misrepresentation*, Part I, 37 Md. L. Rev. 286, 295 (1977) [hereinafter cited as *James & Gray I*]. A showing of fraud also requires proof by clear and convincing evidence. *Peurifoy v. Congressional Motors, Inc.*, 254 Md. 501, 517, 255 A.2d 332, 340 (1969).

As an alternative to bringing an action for deceit, recovery may be obtained on the basis of a negligent misrepresentation. *Vance v. Vance*, 408 A.2d 728, 731 (Md. 1979).

2. Such an action would only be possible in cases in which the "misrepresentation" made was a material one relating to the subject matter of the contract. See, e.g., *Twombly v. Fuller Brush Co.*, 221 Md. 476, 489-91, 158 A.2d 110, 116-18 (1959); *Reid v. Hughlett*, 135 Md. 613, 108 A. 477 (1919). An aggrieved consumer of goods might also utilize Uniform Commercial Code remedies arising out of the Code's warranty, good faith, and unconscionability provisions. See Comment, *Consumer Protection in Georgia: The Fair Business Practices Act of 1975*, 25 EMORY L.J. 445, 448-51 (1975).

Doctrines of caveat emptor traditionally have hampered consumers in their efforts to obtain effective redress for harm suffered as a result of unfair or deceptive trade practices. See *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1016-17 (1967). See generally Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931); Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 945-52 (1974). For a discussion of common law remedies and attendant legal obstacles, see Hester, *Deceptive Sales Practices and Form Contracts — Does the Consumer Have a Private Remedy?*, 1968 DUKE L.J. 831. Remedies preexisting consumer protection legislation include tort actions for misrepresentation or strict liability and contract actions for rescission or damages.

3. For instances of failure to establish the scienter element, see *Canatella v. Davis*, 264 Md. 190, 198-200, 286 A.2d 122, 126-27 (1972); *Lambert v. Smith*, 235 Md. 284, 287, 201 A.2d 491, 493, 493-94 (1964).

defendant's knowledge of the falsity of the statement, his right to recover may be cut off by a "puffing" defense.⁴

Maintaining a successful contract action also presents difficulties. Although an action for breach of express warranties may lie when a promise has been made in writing, there is often no remedy for oral misrepresentations.⁵ Further, the Uniform Commercial Code provisions on implied warranties, which apply to many consumer transactions, cover only sales of consumer goods.⁶ Although the seller's ability to limit implied warranties of merchantability in contracts for consumer goods is proscribed in Maryland,⁷ a consumer's remedies in other contract actions are often limited by sellers' skillful drafting of contract clauses.⁸

In addition to the difficulties the consumer faces in trying to establish the elements of a tort or contract action, there is the problem that some misleading statements are not covered by any existing action. For example, there is no traditional legal remedy for misleading statements of opinion⁹ or statements not relating to the good or service that is the subject of the

4. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 109, at 722-23 (4th ed. 1971). At common law a misrepresentation does not provide grounds for redress if it is a statement of opinion (puffing) rather than fact. Hester, *supra* note 2, at 840; James & Gray, *Misrepresentation*, Part II, 37 MD. L. REV. 488, 488-96 (1978) [hereinafter cited as James & Gray II]. See *Appel v. Hupfield*, 198 Md. 374, 379-81, 84 A.2d 94, 96-97 (1951).

A similar defense is available in actions for breach of express warranty under the Uniform Commercial Code. It provides that any "affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain" creates an express warranty, MD. COM. LAW CODE ANN. § 2-313(1) (1975) (emphasis supplied), and that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty, *id.* § 2-313(2) (emphasis supplied). For a discussion of the difficulty in determining whether a statement is a "puff" or a warranty, see J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 9-3, at 274-76 (1972).

5. One difficulty may be proving that oral statements were in fact made. A second is that, even if they can be proved, the parol evidence rule may bar their admission. Although in theory the parol evidence rule does not bar evidence to show mistake or fraud, in practice the presence of integration clauses in contracts may result in courts' relying on the rule. See Hester, *supra* note 2, at 836-40.

6. In Maryland, however, they relate to leases and bailments for hire, as well as sales, of goods. MD. COM. LAW CODE ANN. § 2-314(4) (Cum. Supp. 1979). Some courts have begun to find express and implied warranties in the provision of commercial services. *Texas Metal Fabricating Co. v. Northern Gas Prods. Corp.*, 404 F.2d 921 (10th Cir. 1968) (Kansas law); *Vitromar Piece Dye Works v. Lawrence of London, Ltd.*, 119 Ill. App. 2d 301, 256 N.E.2d 135 (1969); *Newmark v. Gimbel's Inc.*, 54 N.J. 585, 258 A.2d 697 (1969); *McCool v. Hoover Equip. Co.*, 415 P.2d 954 (Okla. 1966). *But see, e.g., LaRossa v. Scientific Design Co.*, 402 F.2d 937 (3d Cir. 1968).

7. MD. COM. LAW CODE ANN. § 2-316.1 (Cum. Supp. 1979).

8. See generally Weintraub, *Disclaimer of Warranties and Limitations of Damages for Breach of Warranty Under the UCC*, 53 TEX. L. REV. 60 (1974); Note, *Warranties, Disclaimers and the Parol Evidence Rule*, 53 COLUM. L. REV. 858 (1953).

9. See note 4 and accompanying text *supra*.

transaction.¹⁰ Most significantly, traditional theories afford only very limited protection against misrepresentation by omission, the failure to state relevant facts.¹¹

The Maryland Consumer Protection Act,¹² enacted in 1973,¹³ provides a private cause of action for consumers harmed by several specified unfair or deceptive trade practices, which consist of various types of false and misleading statements made in consumer transactions. The statute affords a remedy for some misrepresentations not covered by traditional theories, in particular, misleading omissions¹⁴ and misrepresentations of the affiliation of a seller or a good.¹⁵

This Comment will examine the provisions of the Act relating to the private cause of action, particularly the proscribed practices, and attempt to resolve some ambiguities in the statute. Various problems of assessing the significance of the Act, among them its interaction with other consumer statutes, will also be examined.

THE MARYLAND CONSUMER PROTECTION ACT

The need to provide adequate protection against unfair or deceptive practices in consumer transactions¹⁶ and to restore an undermined public confidence in merchants,¹⁷ together with a realization that existing laws are "inadequate, poorly coordinated and not widely known or adequately enforced,"¹⁸ led the Maryland legislature to enact a comprehensive Consumer Protection Act.¹⁹ The intention of the legislature was to set

10. For example, statements or deceptive practices designed to induce consumers to deal with a particular seller, other than statements about goods, would not be covered by any traditional action.

11. See W. PROSSER, *supra* note 4, § 106, at 695-98; James & Gray II, *supra* note 4, at 523-27.

12. MD. COM. LAW CODE ANN. §§ 13-101 to -501 (1975 & Cum. Supp. 1979).

13. Ch. 704, 1974 Md. Laws 1484. The present version of the private cause of action allows recovery to any person for "injury or loss sustained by him as the result of a practice prohibited by this title." MD. COM. LAW CODE ANN. § 13-408 (1975). The prohibited practices are listed and defined in section 13-301 of the Act. *Id.* § 13-301 (1975 & Cum. Supp. 1979).

14. *Id.* § 13-301(3) (1975).

15. *Id.* § 13-301(2)(i)(ii).

16. *Id.* § 13-102(a)(1) (Cum. Supp. 1979).

17. *Id.* § 13-102(b)(2).

18. *Id.* § 13-102(a)(2) (1975).

19. *Id.* §§ 13-101 to -501 (1975 & Cum. Supp. 1979). The first major legislative response to widespread deceptive trade practices was the 1938 Wheeler-Lea Amendment to the Federal Trade Commission [hereinafter FTC] Act of 1914. FTC Act, § 5, 38 Stat. 719 (1914), Wheeler-Lea Amendment, § 3, 52 Stat. 111 (1938), codified in 15 U.S.C. § 45(a)(1) (1976 & Supp. 1978). For a discussion of the legislative history of the Wheeler-Lea Amendment, see *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 992-97 (D.C. Cir. 1973). According to one commentator, this amendment "marked the first real departure from the tradition of caveat emptor in consumer contract administration." Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 728 (1972); see *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963). The

"minimum statewide standards for the protection of consumers."²⁰ To accomplish this end, the General Assembly sought to implement strong protective and preventive steps to investigate unlawful consumer practices,²¹

central purpose of § 5(a) of the FTC Act is to abolish the rule of caveat emptor and to replace it with the principle that consumers may rightfully expect that representations of fact are truthful.

Prior to the 1938 legislation, § 5 of the 1914 FTC Act was construed to prohibit only unfair methods of competition, and functioned as an administrative remedy for business competitors rather than for mere consumers. See *FTC v. Raladam Co.*, 283 U.S. 643 (1931). The Wheeler-Lea Act conferred additional jurisdiction on the Commission to proscribe "unfair or deceptive acts or practices," making proof of adverse competitive impact unnecessary. Lovett, *supra*, at 728-29. Under the Wheeler-Lea Amendment the emphasis shifted from "control of deceptive advertising practices as an incident of antitrust regulation to the avowed purpose of protecting the consumer from fraud." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 994 (D.C. Cir. 1973) (footnote omitted).

The FTC Act, even as amended, was not intended to afford a mechanism for the resolution of private disputes. See Eovaldi & Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 Nw. U.L. REV. 281, 298 (1971). The Commission is generally interested in practices that affect the public as a whole rather than the individual consumer, Hill, *Introduction to Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609, 610-11 (1977), and the decision whether to act against an unlawful act or practice depends on whether such action would be in the "public interest." 15 U.S.C. § 45(b) (1970). *E.g.*, *FTC v. Raladam Co.*, 283 U.S. 643, 646-47 (1931); *FTC v. Klesner*, 280 U.S. 19, 28 (1929) ("the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial."); 2 G. ROSDEN & P. ROSDEN, *THE LAW OF ADVERTISING* § 34.02[2][b] (1979). Although a minor limitation, in order for the FTC to act under § 5, unfair or deceptive acts or practices must be "in or affecting" interstate commerce. 15 U.S.C. §§ 45(a)(1), 46, 52 (1976).

The effectiveness of the FTC as an instrument for consumers to obtain redress is limited by several other factors. Consumers injured by deceptive acts or practices do not receive restitution when the FTC issues its standard sanction, the cease and desist order. The enactment of the Federal Trade Commission Improvements Act in 1975 increased the Commission's power to bring civil actions. See 15 U.S.C. § 45(m) (1976) (authority to seek civil penalties for violations of FTC rules and cease and desist orders), *id.* § 57(b) (power to seek a variety of consumer redress orders); *id.* § 56 (power to represent itself in civil proceedings). Section 57(b) has been subject to serious interpretation problems and has rarely been used by the Commission since its enactment. See generally Kintner & Westermeier, *Obtaining Refunds For Consumers Under Section 19 of the Federal Trade Commission Act*, 29 SYRACUSE L. REV. 1025 (1978).

No private cause of action is available under the Act. See *Moore v. New York Cotton Exch.*, 270 U.S. 593, 603 (1929); *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973). The FTC is unresponsive to consumer complaints directed at acts or practices having only a localized effect, Eovaldi & Gestrin, *supra*, at 299, and even when the Commission does act, there is typically a three to five-year delay from the initial complaint to the final order, *id.*

20. MD. COM. LAW CODE ANN. §§ 13-102(b)(1), -103(a) (1975).

21. *Id.* § 13-102(b)(3).

to assist the public in obtaining relief from these practices, and to prevent these practices from occurring in Maryland.²²

The Act prohibits certain unfair or deceptive practices in connection with the provision of consumer credit, debts, goods, realty, and services.²³ "Consumers" include lessees and recipients of the covered items, as well as actual and prospective purchasers.²⁴ "Merchants" include direct or indirect suppliers of consumer credit, debts, goods, realty, and services.²⁵ Covered transactions are broadly defined to include attempts to sell or otherwise provide covered items, as well as consummated transactions.²⁶

There are three exemptions from the provisions of the Act. Companies regulated by the Public Service Commission are not subject to its provisions,²⁷ nor are advertising media broadcasting or printing the claims of others.²⁸ A third exemption covers professionals and quasi-professionals,²⁹ most of whom are required to obtain licenses to practice and are otherwise regulated.³⁰

As an aid to interpretation of the Act, section 13-105 provides:

This title shall be construed and applied liberally to promote its purpose. It is the intent of the General Assembly that in construing the term unfair or deceptive trade practices, due consideration and weight be given to the interpretations of §5(a) (1) of the Federal Trade Commission Act by the Federal Trade Commission and the federal courts.³¹

This section provides guidance both by its mandate to construe the Act broadly and in the direction to consider the body of law developed under the Federal Trade Commission Act.³² In view of the absence of Maryland case law interpreting the state act, the use of cases decided under the FTC Act as an interpretive tool may be especially helpful.³³

22. *Id.*

23. *Id.* § 13-303 (Cum. Supp. 1979).

24. *Id.* § 13-101(c).

25. *Id.* § 13-101(g).

26. *Id.* § 13-101(i).

27. *Id.* § 13-104(2) (1975).

28. *Id.* § 13-104(3).

29. *Id.* § 13-104(1).

30. Clergymen and Christian Science practitioners are the single exception to the license requirement.

31. MD. COM. LAW CODE ANN. § 13-105 (1975).

32. See note 19 *supra*. This section further serves to assure businessmen that Maryland law is similar to and complements the standards governing interstate commerce. See Comment, *Consumer Protection in Georgia: The Fair Business Practices Act of 1975*, *supra* note 2, at 455.

33. Case law developed under the FTC Act should not be regarded as binding precedent on Maryland courts. Serious constitutional separation of powers issues would be raised if the legislature purported to dictate to the courts that certain statutory language should be construed in accordance with "precedent" newly

The Act is administered by the Division of Consumer Protection of the Department of Law.³⁴ The Division is given broad powers of enforcement, including the powers to conduct investigations upon complaint or on its own initiative;³⁵ to conciliate disputes³⁶ or set up a program of voluntary arbitration;³⁷ to issue cease and desist orders;³⁸ and to adopt reasonable regulations and rules to carry out its provisions.³⁹

Upon complaint by a consumer, the Division conducts an investigation.⁴⁰ If it finds reasonable grounds to believe a violation occurred, it must try to reach a solution through conciliation.⁴¹ Upon its own initiative, it may hold a public hearing, with presentation of testimony under oath and proceedings on the record, to determine whether a violation has occurred.⁴²

fashioned by the legislature. See MD. CONST., Decl. of Rts., art. 8. Provisions similar to § 13-105 in consumer protection legislation in other states have been interpreted to treat constructions of the FTC Act as source material to guide rather than to bind state courts. See *Fitzgerald v. Chicago Title & Trust Co.*, 46 Ill. 3d 526, 528, 361 N.E.2d 94, 96 (1977) (legislature lacks authority "to state explicitly how the judiciary shall construe a statute."); *State v. Reader's Digest Ass'n, Inc.*, 81 Wash. 2d 259, 275, 501 P.2d 290, 301 (1972).

34. MD. COM. LAW CODE ANN. § 13-201 (Cum. Supp. 1979). A nine-member Consumer Council, with representatives of business and consumer interests and of the public sector, advises on general goals, undertakes studies, and promotes cooperation among various groups. *Id.* § 13-202 (1975 & Cum. Supp. 1979).

35. *Id.* § 13-204(1), -204(2). The Division also has authority to assess the costs of its investigation and damages for failing to make proper restitution against a violator. *Id.* § 13-204(10).

36. *Id.* §§ 13-204(3), -402.

37. *Id.* § 13-404(b) (1975). Under the arbitration rules set out in the Code of Maryland Regulations, 1 COMAR 2.01.06 (1977), arbitration may occur only when the Division determines there is a factual dispute, *id.* § 2.01.06.01, but may be requested by either party or suggested by the Division after failure of direct negotiations, *id.* § 2.01.06.05.

38. MD. COM. LAW CODE ANN. §§ 13-204(4), -403 (1975). It may also, in cooperation with the Department of Licensing, suspend or revoke the license of a merchant who refuses to cease and desist. *Id.* § 13-204(5).

39. *Id.* § 13-204(12). Section 13-205 sets out the power to adopt and procedure for adopting rules. *Id.* § 13-205. Rules may be adopted to assure orderly operation of the Division and to define further unfair or deceptive trade practices. *Id.* § 13-204. They may not, however, modify, expand, or conflict with the statutory definitions. *Id.* § 13-205(a)(2).

The Consumer Protection Division has adopted regulations relating to retailers' refund policies, 1 COMAR 2.01.05 (1976), and invention development services, *id.* 2.01.07 (1978). It has adopted rules providing for arbitration of consumer disputes, *id.* 2.01.06 (1977), as well as procedural rules for cease and desist order hearings, *id.* 2.01.02 (1975).

40. MD. COM. LAW CODE ANN. § 13-401(b) (1975).

41. *Id.* § 13-402(a) (1975 & Cum. Supp. 1979). The terms of the conciliation agreed to may be incorporated into a written agreement, *id.*, and failure to adhere to its terms is a violation of the Act, *id.* § 13-402(c) (1975).

Where violations are causing immediate, substantial, and irreparable injury, is sought. See *Devine Seafood, Inc. v. Attorney General*, 37 Md. App. 439, 446-48, 377 A.2d 1194, 1197-99 (1977).

42. *Id.* § 13-403(a) (1975). It seems unlikely, in light of the mandatory conciliation and voluntary arbitration procedures of the Act, that a single consumer's complaint

If a violation is found, the Division states its findings and issues an order requiring the violator to cease the violation and take affirmative action.⁴³ The Attorney General is also authorized to seek an injunction to prohibit continuation of a violation.⁴⁴ Penalties imposed under the Act are primarily civil,⁴⁵ but criminal penalties may also be imposed.⁴⁶

In addition to public enforcement proceedings,⁴⁷ any person may institute a private action⁴⁸ and recover damages for injury or loss sustained as a result of a prohibited practice as defined in section 13-301.⁴⁹ Due to its potential impact on existing law and value as an enforcement mechanism, the provision of a private cause of action is particularly significant.⁵⁰

would reach the hearing stage. The fact that holding such a hearing is discretionary with the Division, *id.*, would make it likely the hearing will be reserved for violations that are the subject of numerous complaints or that the Division itself investigates.

43. *Id.* § 13-403(b).

44. *Id.* § 13-406. A cease and desist hearing need not be held before the injunction is sought. *See Devine Seafood, Inc. v. Attorney General*, 37 Md. App. 439, 446-48, 377 A.2d 1194, 1197-99 (1977).

45. MD. COM. LAW CODE ANN. § 13-410 (1975). A first offender is subject to a fine of up to \$300, *id.* § 13-410(a); and those who repeat the same violations are subject to a \$500 fine, *id.* § 13-410(b).

46. *Id.* § 13-411. Violation is a misdemeanor punishable by a \$1,000 maximum fine, imprisonment of up to a year, or both. *Id.* § 13-411(a). Imprisonment may not be imposed for violation of an administrative order or for a unit pricing violation. *Id.* § 13-411(b).

47. *See* notes 40 to 44 and accompanying text *supra*.

48. MD. COM. LAW CODE ANN. § 13-408 (1975). Although § 13-401 provides a mechanism for obtaining redress through Division agency enforcement procedures, *see id.* § 13-401(e), an aggrieved consumer apparently need not pursue and exhaust the remedies available through the Division of Consumer Protection before initiating a private cause of action. *Cf. Devine Seafood, Inc. v. Attorney General*, 37 Md. App. 439, 445-48, 377 A.2d 1194, 1197-99 (1977) (the Attorney General need not attempt conciliation as a condition precedent to seeking injunctive relief). *See generally* Travers & Landers, *The Consumer Class Action*, 18 KAN. L. REV. 811, 812 (1970). A person who decides to enforce his rights through the Division is not barred from further action. If a consumer is "aggrieved by an order or decision of the Division, he may institute any appropriate proceeding he considers necessary." MD. COM. LAW CODE ANN. § 13-407 (1975).

49. MD. COM. LAW CODE ANN. § 13-301 (Cum. Supp. 1979).

50. A reading of § 13-302, which states that "[a]ny practice prohibited by this title is a violation of this title, whether or not any consumer has in fact been misled [*sic*], deceived or damaged as a result of that practice," *id.* § 13-302 (1975) (emphasis added), with § 13-408, which permits any person to "bring an action to recover for injury or loss sustained by him as a result of a practice prohibited by this title," *id.* § 13-408 (emphasis added), seems to raise the question whether a consumer may pursue a private cause of action even if he has not been damaged. This potential conflict between sections illustrates the problems of construing a statute containing public enforcement measures such as injunctions and cease and desist orders as well as private causes of action. The apparent conflict stems from a legislative failure to restrict the operation of various portions of the statute to remedies based on either public or private action. Enjoining an activity that has not yet caused actual harm seems entirely consistent with an important purpose of the Act, to prevent unfair or

PROHIBITED PRACTICES⁵¹ UNDER THE ACT

Section 13-301, the substantive core of the Act, defines unfair⁵² or deceptive practices by a nonexclusive enumeration of twelve practices.⁵³ For the purpose of construing the section, these practices can be divided into

deceptive practices. *See id.* §13-102(b)(3). It is clearly contrary, however, to the language of §13-408 to permit a consumer a cause of action if no damages have been sustained, and no legitimate legislative purpose would be served by such a reading. Section 13-302 should be interpreted to pertain to enforcement action by the Attorney General and the Division of Consumer Protection, and §13-408 should be read to control the elements necessary to establish a private cause of action.

51. Although the practices are discussed in the context of a civil cause of action, no distinction is made in the statute between prohibited practices for civil and criminal purposes.

52. Attention in this Comment has been primarily focused on acts or practices that are deceptive. Unfair practices are also prohibited under the Act. In *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), the Supreme Court summarized the factors the FTC considers in deciding whether an act or practice is unfair:

- (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise — whether, in other words, it is within the penumbra of some common law, statutory, or other established concept of unfairness;
- (2) whether it is immoral, unethical, oppressive, or unscrupulous;
- (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Id. at 244 n.5 (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking. 29 Fed. Reg. 8324, 8355 (1964)). For a discussion of FTC unfairness violations, see Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 680-85 (1977). As interpreted by the Washington Supreme Court, an act which is illegal and against public policy is a *per se* unfair trade practice. *State v. Reader's Digest Ass'n, Inc.*, 81 Wash. 2d 259, 276, 501 P.2d 290, 301-02 (1972).

53. MD. COM. LAW CODE ANN. §13-301 (Cum. Supp. 1979). The list of practices in §13-301 only illustrates the types of practices that are unlawful. *See* Revisor's Note to ch. 49, §3, of the 1975 version of the Act, which states:

[T]he phrase "but not limited to" is deleted as unnecessary since use of the word "include" is not intended in any sense to be exclusionary or limiting The Commission emphasizes that neither its reorganization of this section nor the deletion of the phrase "but not limited to" are intended in any manner to make applicable the maxims of *expressio unius est exclusio alterius*, *eiusdem generis* or doctrines of similar implication. That these doctrines were not intended by the General Assembly to apply to this section is apparent from the declaration of findings, purpose, and legislative intent in §§13-102 and 13-103, and more particularly, from the statement in §13-105 that this title be "construed and applied liberally to promote its purpose."

Id. §13-301 (1975).

Section 13-301 appears to be loosely based on §2 of the Uniform Deceptive Trade Practices Act, formulated by the National Conference of Commissioners on Uniform State Laws in 1964. Under the Uniform Act, twelve types of practices are proscribed:

- (a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

three different types — a major subgroup pertaining to representations or statements,⁵⁴ two types of telephone solicitation practices,⁵⁵ and several

- (1) passes off goods or services as those of another;
- (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship approval or certification of goods or services;
- (3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) uses deceptive representations or designations of geographic origin in connection with goods or services;
- (5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
- (6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or second-hand;
- (7) represents that goods or services are of a particular standard, quality or grade or that goods are of a particular style or model, if they are of another;
- (8) disparages the goods, services, or business of another by false or misleading representation of fact;
- (9) advertises goods or services with intent not to sell them as advertised;
- (10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions, or
- (12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

UNIFORM DECEPTIVE TRADE PRACTICES ACT (1966 version).

In addition to the practices defined in § 13-301, the Maryland Act prohibits referral sales, MD COM. LAW CODE ANN. § 13-304 (1975), and prizes conditioned on purchases or sales promotions, *id.* § 13-305 (1975 & Cum. Supp. 1979), and also imposes affirmative duties owed to customers in certain other transactions. The affirmative duties imposed by subtitle three include: provision of a certificate guaranteeing that a gift or other inducement offered to a customer in exchange for business will in fact be given to the customer, *id.* § 13-306 (1975); provision by a repair company of a written bill containing specified information, *id.* § 13-307; labeling of certain electrical products, *id.* §§ 13-308, -309; disclosure of the seating plan and location of physical obstructions by sellers of reserved seat tickets, *id.* § 13-310; prohibition of a service contract as prerequisite to a sale of merchandise, *id.* § 13-311 (Cum. Supp. 1979); notification to a credit card holder by the card issuer that the issuer has been served with a subpoena for information relating to the holder's account, *id.* § 13-312; and minimum standards for fire resistant insulating material, *id.* § 13-313. Miscellaneous other consumer protection provisions are located in eleven separate subtitles of title 14 of the Commercial Law Article.

54. MD. COM. LAW CODE ANN. § 13-301(1) to -301(9) (Cum. Supp. 1979). The prohibited practices are:

- (1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;
- (2) Representation that:
 - (i) Consumer goods, consumer realty, or consumer services have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have;
 - (ii) A merchant has a sponsorship, approval, status, affiliation, or connection which he does not have;

miscellaneous violations of titles 13 and 14.⁵⁶ Only the first subgroup is of concern in this Comment.

Only three of the nine definitions in the first subgroup require proof of scienter.⁵⁷ The other six provisions apparently impose strict liability for

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- (iii) Deteriorated, altered, reconditioned, reclaimed, or secondhand consumer goods are original or new; or
 - (iv) Consumer goods, consumer realty, or consumer services are of a particular standard, quality, grade, style, or model which they are not;
 - (3) Failure to state a material fact if the failure deceives or tends to deceive;
 - (4) Disparagement of the goods, realty, services, or business of another by a false or misleading representation of a material fact;
 - (5) Advertisement or offer of consumer goods, consumer realty, or consumer services:
 - (i) Without intent to sell, lease, or rent them as advertised or offered; or
 - (ii) With intent not to supply reasonably expected public demand, unless the advertisement or offer discloses a limitation of quantity or other qualifying condition;
 - (6) False or misleading representation of fact which concerns:
 - (i) The reason for or the existence or amount of a price reduction; or
 - (ii) A price in comparison to a price of a competitor or to one's own price at a past or future time;
 - (7) Knowingly false statement that a service, replacement, or repair is needed;
 - (8) False statement which concerns the reason for offering or supplying consumer goods, consumer realty, or consumer services at sale or discount prices;
 - (9) Deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with:
 - (i) The promotion or sale of any consumer goods, consumer realty, or consumer service; or
 - (ii) A contract or other agreement for the evaluation, perfection, marketing, brokering or promotion of an invention; or
 - (iii) The subsequent performance of a merchant with respect to an agreement of sale, lease, or rental.

55. *Id.* § 13-301(10), -301(11). Subsection (10) imposes affirmative identification duties during the course of a solicitation by telephone. Unfair or deceptive trade practices include:

- (10) Solicitations of sales or services over the telephone without first clearly, affirmatively, and expressly stating:
 - (i) The solicitor's name and the trade name of a person represented by the solicitor;
 - (ii) The purpose of telephone conversation; and
 - (iii) The kind of merchandise, real property, intangibles, or service solicited;

Subsection (11) covers "[u]se of any plan or scheme in soliciting sales or services over the telephone that misrepresents the solicitor's true status or mission."

56. *Id.* § 13-301(12). Subsection (12) was amended in 1979 to add deceptive practices relating to kosher products to the list. Ch. 536, 1979 Md. Laws 1546.

57. MD. COM. LAW CODE Ann. § 13-301(5), -301(7), -301(9) (Cum. Supp. 1979). A violation of the FTC Act may be established even though the defendant lacks scienter. *E.g.*, *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967). Scienter might, however, be required in criminal cases. *Cf.* *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (element of criminal antitrust violation).

false representations, a significant departure from common law tort actions in which recovery of damages is generally possible only if the misrepresentation is intentional.⁵⁸ In instances of innocent misrepresentation a consumer generally can only seek rescission of a contract, for recovery of damages is subject to various limitations,⁵⁹ although where a representation constitutes a warranty a consumer may be able to recover for breach in appropriate cases.⁶⁰ Section 13-301 represents a significant step beyond even warranty liability, for the Act covers transactions involving services, credit, and real property, as well as goods. It also prohibits a type of misrepresentation not previously covered under any theory, misstatements of a merchant's affiliation or a good's sponsorship.⁶¹

Unfair or deceptive practices consisting of representations or statements may be classified into two general categories: provisions in which representations constitute per se unfair or deceptive trade practices, and provisions that require proof of deception. A given fact situation may fall within more than one subsection of a category, or may in fact be classified under either category. The overlapping of various provisions may be a source of possible confusion in construing this section. Of the nine subsections defining deceptive or unfair trade practices in forms of representations or statements, six do not require separate proof of deception,⁶² and in this sense they may be categorized as per se unfair or deceptive trade practices. In defining prohibited practices in terms that omit reference to consumer deception, the legislature has substituted its judgment for that of a court or jury with respect to certain types of misrepresentations deemed to be inherently deceptive.

Five basic statutory terms applicable to provisions in the category of per se unfair or deceptive trade practices may be identified: "falsity," "knowledge," "intent," "false or misleading," and "materiality."⁶³ The subsections of section 13-301 are defined in terms of various combinations of these elements. The most basic element of a per se unfair or deceptive

58. See W. PROSSER, *supra* note 4, § 105, at 683-89.

59. See generally Hill, *Breach of Contract as a Tort*, 74 COLUM. L. REV. 40 (1974); Hill, *Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679 (1973); James & Gray I, *supra* note 1, § 7.

60. See notes 5 to 8 and accompanying text *supra*.

61. MD. COM. LAW CODE ANN. § 13-301(2) (Cum. Supp. 1979). A significant change is the provision prohibiting misleading omissions of material fact if they are deceptive. *Id.* § 13-301(3). Omissions are also covered in subsection (9), although there scienter is required. *Id.* § 13-301(9).

62. Subsections (2) and (8) clearly do not require proof of deception, the only requirement being falsity of the statement. *Id.* § 13-301 (2), -301(8). Two subsections requiring scienter on the part of the seller likewise do not seem to require proof of deceptions. *Id.* § 13-301 (5), -301(7). Some parts of subsection (9) fall into this category also. Two subsections prohibiting "false or misleading" statements, *id.* § 13-301 (4), -301(6), do not require such proof where false statements are concerned, although they may if "misleading" is interpreted to mean misleading to a particular consumer.

63. In interpreting these terms, reference will be made, where appropriate, to common law concepts and to cases decided under the FTC Act.

practice is a false representation. Subsections (2)⁶⁴ and (8)⁶⁵ of section 13-301 encompass untrue representations pertaining to nearly every imaginable characteristic of consumer goods, realty, or services.⁶⁶ Of the five possible statutory components, falsity is the only element that must be proved in every case in order to establish a prima facie unfair or deceptive practice. With respect to the situations governed by these provisions, the legislature has determined that untruth is inherently deceptive, and consequently the plaintiff consumer may establish an unfair or deceptive practice without proof of anything beyond damages and falsity of the representation.⁶⁷

Since section 13-301 generally omits a scienter requirement, it becomes especially important to determine whether a false representation has in fact been made. The statute does not specify that representations be either oral or written, and it may be possible to bring a cause of action under the Act based on implied representations. An analysis of whether a representation was made must proceed with an examination of the seller's portrayal of the product, including the totality of the circumstances surrounding his communication with the consumer, and thus the innuendo and illusion surrounding the transaction may be as relevant as specific express statements by the representer.⁶⁸ Two of the statutory provisions combine the element of falsity with either a knowledge or an intent component. Section 13-301(7) is defined as a "[k]nowingly false statement that a service,

64. Subsection (2) includes any representation that:

- (i) Consumer goods, consumer realty, or consumer services have a sponsorship, approval, accessory, characteristic, ingredient, use, benefits, or quantity which they do not have;
- (ii) A merchant has a sponsorship, approval, status, affiliation, or connection which he does not have;
- (iii) Deteriorated, altered, reconditioned, reclaimed, or secondhand consumer goods are original or new; or
- (iv) Consumer goods, consumer realty, or consumer services are of a particular standard, quality, grade, style, or model which they are not.

MD. COM. LAW CODE ANN. § 13-301(2) (Cum. Supp. 1979).

65. Subsection (8) encompasses any "[f]alse statement which concerns the reason for offering or supplying consumer goods, consumer realty, or consumer services at sale or discount prices." *Id.* § 13-301(8).

66. Another type of false statement or misrepresentation is found in § 13-301(11). This subsection is similar to the type of representation defined in § 13-301(2)(ii), but is different in not being addressed to merchants, and in its specific concern with the method of misrepresentation. This subsection includes "[u]se of any plan or scheme in soliciting sales or services over the telephone that misrepresents the solicitor's true status or mission." *Id.* § 13-301 (11).

67. In establishing a private cause of action pursuant to § 13-408, a plaintiff must allege facts sufficient to show that an unfair or deceptive trade practice exists under § 13-301, and then must allege a violation of § 13-303. Section 13-303 functions to prohibit "any unfair or deceptive trade practice, as defined in this subtitle or as further defined by the Division." *Id.* § 13-303.

68. See Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

replacement, or repair is needed[.]”⁶⁹ In requiring a mental element, the legislature probably intended to insulate from liability persons who make inadvertent or mistaken diagnoses that services or repairs are needed. The other type of representation or statement conjoined with a mental element is found in section 13-301(5). This section defines an unfair or deceptive trade practice as an advertisement or offer of consumer goods, realty, or services *without the intent* to comply with the terms of the offer or advertisement, or *with intent* not to supply reasonably expected public demand.⁷⁰ The addition of an intent element for these two practices⁷¹ probably represents a legislative judgment that an inability either to comply with the terms of an advertisement or to supply public demand may be explained by legitimate business reasons.

An intermediate category of unlawful practices must be discussed. This category is labeled intermediate because the term “misleading” is used in conjunction with falsity, and, depending on the type of misrepresentation, a consumer may elect to establish that the representation was either false or misleading. If a plaintiff elects to prove falsity, then the unlawful practice may appropriately be characterized as *per se* deceptive.⁷² In instances, however, in which the plaintiff chooses to prove that the representation was misleading, the consumer must establish that he was led into a mistaken belief through defendant’s deception.⁷³ There are two unlawful practices in

69. MD. COM. LAW CODE ANN. § 13-301 (7) (Cum. Supp. 1979).

70. Section 13-301(5) includes any advertisement or offer of consumer goods, consumer realty, or consumer services:

- (i) without intent to sell, lease, or rent them as advertised or offered; or
- (ii) with intent not to supply reasonably expected public demand, unless the advertisement or offer discloses a limitation of quantity or other qualifying condition.

Id. § 13-301(5).

71. Section 13-104(3), the general exemption provision, refers to another category of activity that is prohibited if the requisite mental state exists. Advertising media are immune from liability arising out of advertisements that violate the Act “unless the station, publisher, or printer engages in an unfair or deceptive trade practice in the sale of its own goods or services or has *knowledge* that the advertising is in violation of this title.” *Id.* § 13-104 (emphasis added).

72. See note 62 and accompanying text *supra*.

73. Under the FTC Act, the terms “misleading” and “deceptive” appear to be synonymous. See, e.g., *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977) (“[A]dvertisements may be deceptive if they have a tendency and capacity to convey misleading impressions to consumers even though other non-misleading interpretations may also be possible.”); *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) (capacity to deceive defined in terms of “a likelihood or fair probability that the reader will be misled.”). Under 15 U.S.C. § 52(b) the dissemination of a false advertisement is an unfair or deceptive act or practice under 15 U.S.C. § 45. False advertisement is defined as:

an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to

this intermediate category. Section 13-301(6) encompasses false or misleading representations of fact that pertain to "(i) [t]he reason for or the existence or amount of a price reduction; or (ii) [a] price in comparison to a price of a competitor or to one's own price at a past or future time."⁷⁴ The second definition in this category is aimed at "[d]isparagement of the goods, reality, services, or business of another"⁷⁵

Use of the phrase "false or misleading *representation of fact*" in section 13-301(6) may raise the question of the applicability of a common law defense to a consumer protection private action.⁷⁶ Under the Maryland common law of deceit, a false representation must be one of past or existing fact, not opinion, promise, or expectation unless the promise is made with the intention of not performing it.⁷⁷ Representations asserted as statements of fact pertaining to quality and condition may constitute fraud. Fraud may also be established if the defendant prevents the plaintiff from investigation of conditions, or when the facts are peculiarly within the knowledge of the defendant and difficult for the plaintiff to ascertain, as where the misrepresentations relate to latent defects.⁷⁸ As a result of this fact-opinion distinction, certain representations are not actionable under common law fraud because they are considered "puffing."⁷⁹ The theory underlying the

reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

15 U.S.C. § 55(a)(1) (1976). Intent to deceive is unnecessary to support a deceptive advertising charge. *See, e.g.,* Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921, 925 (6th Cir. 1968); Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (7th Cir. 1967).

74. MD. COM. LAW CODE ANN. § 13-301(6) (Cum. Supp. 1979).

75. *Id.* § 13-301(4). The disparagement practice, unlike the "price" practice, explicitly requires that such representations of fact be material. *Id.*

76. Three other definitions of unfair or deceptive trade practices are also expressly phrased in terms of representations of fact. *Id.* § 13-301(3), -301(4), -301(9). The considerations mentioned in the text accompanying this note are similarly applicable to these other subsections.

77. *Appel v. Hupfield*, 198 Md. 374, 382, 84 A.2d 94, 97 (1951). *See* James & Gray II, *supra* note 4, § 8. For a discussion of the distinction between fact and opinion, see P. Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643, 656-58 (1937).

78. *Fowler v. Benton*, 229 Md. 571, 579, 185 A.2d 344, 349-50 (1962).

79. *Appel v. Hupfield*, 198 Md. 374, 379-80, 84 A.2d 94, 96 (1951). Plaintiff claimed that the defendants listed their house at \$5,500 although it was only worth \$4,000. The court stated:

It is common knowledge that owners and agents often place an exaggerated value on property which they are trying to sell. Statements as to value of property made by an owner or agent seeking to dispose of it by sale or exchange are generally regarded as mere commendatory statements, "dealer's talk," or "puffing," and cannot form the basis of a charge of fraud.

Id. The court described a representation of value as an expression of opinion, upon which a person is not entitled to rely. *Id.* at 380, 84 A.2d at 97. *See also* RESTATEMENT (SECOND) OF TORTS § 542 (1977).

common law "puffing" defense is that no reasonable man would believe the statement to be true and accordingly would not rely on it in making a purchase.⁸⁰ Traditional common law assumptions about the nature of a reasonable man, however, are affected by one of the fundamental premises of consumer protection legislation — that the law is designed to protect ignorant and credulous consumers, who are often influenced by appearances and general impressions.⁸¹ The standard of care necessary to defeat a "puffing" defense under the FTC Act may be explained as less than the traditional reasonable man standard, or perhaps as the reasonably vulnerable consumer. A representation may be deemed to be deceptive even if a reasonable or intelligent person would not have been deceived, and a private cause of action based on the Consumer Protection Act would be immune from a contributory negligence defense that could be raised in a common law deceit action in Maryland.⁸² Under the FTC Act the common law distinction between misrepresentations of fact and opinion has been largely ignored in determining whether deception has occurred.⁸³ Furthermore, a statement may be deemed to have the capacity to deceive⁸⁴ even if a qualification to the "misrepresentation" has been made, so long as it is less conspicuous than the deceptive statement.⁸⁵

80. W. PROSSER, *supra* note 4, § 109. See also RESTATEMENT OF TORTS § 542 (1938).

81. *E.g.*, Gulf Oil Corp. v. FTC, 150 F.2d 106, 109 (5th Cir. 1945); Gelb v. FTC, 144 F.2d 580, 582 (2d Cir. 1944); Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942); Moretrench Corp. v. FTC, 127 F.2d 792, 795 (2d Cir. 1942); General Motors Corp. v. FTC, 114 F.2d 33, 36 (2d Cir. 1940), *cert. denied*, 312 U.S. 682 (1941). See Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 458-62 (1964). Under the FTC Act the standard for deception is measured by the average, ordinary people to whom a representation is addressed, many of whom are unsophisticated. See *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *Feil v. FTC*, 285 F.2d 879, 887 (9th Cir. 1960); *Ford Motor Co., v. FTC*, 120 F.2d 175, 182 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941); 2 G. ROSDEN & P. ROSDEN, *supra* note 19, § 18.02[1] (1979); Pitofsky, *supra* note 52, at 675-79; Thain, *Advertising Regulation: The Contemporary FTC Approach*, 1 FORDHAM URB. L.J. 349, 381-84 (1973). "If an advertisement is capable of being interpreted in more than one way and one of those interpretations is false and likely to mislead a substantial portion of consumers, the advertisement is unlawful under § 5." *Giant Food, Inc. v. FTC*, 322 F.2d 977, 981 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964).

82. See, *e.g.*, *Boulden v. Stilwell*, 100 Md. 543, 60 A. 609 (1905); Comment, *Deceit and Negligent Misrepresentation in Maryland*, 35 Md. L. Rev. 651, 670-71 (1976).

83. See, *e.g.*, *Erickson v. FTC*, 272 F.2d 318 (7th Cir. 1959), *cert. denied*, 362 U.S. 940 (1960); *Wybrant Sys. Prods. Corp. v. FTC*, 266 F.2d 571 (2d Cir.), *cert. denied*, 361 U.S. 883 (1959).

84. Under consumer protection legislation, a practice is prohibited if the "misrepresentation" taken as a whole has the capacity or tendency to deceive. See, *e.g.*, *Speigel, Inc. v. FTC*, 411 F.2d 481 (7th Cir. 1969); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962); *Elliot Knitwear, Inc. v. FTC*, 266 F.2d 787, 790 (2d Cir. 1959).

85. *Giant Food, Inc. v. FTC*, 322 F.2d 977, 986 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964); *Metal Stamping Corp. v. General Motors Corp.*, 33 F.2d 411, 412 (7th Cir. 1929).

The second category of representations or statements in section 13-301 contains two non per se practices that expressly require proof of "tendency" or effect of deception.⁸⁶ The first such practice, section 13-301(1), in some respects a category likely to overlap with many others, includes "[f]alse, falsely disparaging, or misleading oral or written statement, visual description, or other representations of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers."⁸⁷ In sum, in the category of non per se unfair or deceptive practices, unlike per se practices, it is necessary for a consumer to establish that a representation has the capacity or tendency to deceive, proof of a statutory term that is unnecessary when establishing mere falsity for per se deceptive practices. Both of the provisions include the term "tendency" to deceive,⁸⁸ suggesting that a consumer need not establish that he was actually deceived in order to recover in a private cause of action. When a consumer has been damaged by a section 13-301 practice, however, he must in fact have been deceived.⁸⁹ The issue of how "tendency" should be construed illustrates the problems of a single statutory definition enforced by both public and private mechanisms.⁹⁰ Under the FTC Act it is well settled that the Commission need only establish capacity to deceive, not actual deception, in order to find an advertisement deceptive.⁹¹ The reason for this rule helps to explain why the capacity to deceive standard would generally be inappropriate to private causes of action based on violations of section 13-301. The Commission's orders are designed to prevent future illegal practices rather than to afford compensatory damages or impose punishment.⁹² In other words, "[d]eception itself is the evil the statute is designed to prevent";⁹³ the absence of injury does not mean that there is no deception.

86. MD. COM. LAW CODE ANN. § 13-301(1), -301(3) (Cum. Supp. 1979).

87. *Id.* § 13-301(1).

88. Section 13-301(3) also contains the term "capacity" to deceive. *Id.* § 13-301(3).

89. To the extent that a consumer did not actually suffer damages caused by a representation that merely had the tendency to deceive, it appears that a consumer could not establish a private cause of action under § 13-408, which allows recovery for "injury or loss sustained." *Id.* § 13-408 (1975).

90. See note 50 *supra*.

91. *E.g.*, Thiret v. FTC, 512 F.2d 176, 180 (10th Cir. 1975); Spiegel v. FTC, 494 F.2d 59, 63 (7th Cir.), *cert. denied*, 419 U.S. 896 (1974).

92. Feil v. FTC, 285 F.2d 879, 896 (9th Cir. 1960).

93. Spiegel v. FTC, 494 F.2d 59, 63 (7th Cir. 1975), *cert. denied*, 419 U.S. 896 (1974) (quoting Florsheim v. FTC, 411 F.2d 874, 878 (9th Cir. 1969)). Apparently because of the importance placed on private causes of action supplementing state enforcement programs, one court has utilized a capacity to deceive test for a private cause of action. See Testo v. Russ Dunmire Oldsmobile Inc., 16 Wash. App. 39, 554 P.2d 349 (1976).

Section 13-301(3) contains the language "tends to deceive" but does not refer to the deception of more than one consumer. It is therefore doubtful whether a capacity to deceive test would be applicable to a private cause of action based on a violation of this subsection.

Section 13-301(1) not only contains capacity to deceive language, but of the twelve independent unfair or deceptive practices defined in § 13-301, it is the only subsection that requires that consumers, rather than an individual consumer, be

The statutory subsections requiring proof of deception appear to require proof that the defendant either caused the plaintiff to believe in a falsehood or failed to fulfill the plaintiff's expectations that were caused by the defendant's representation or statement. Defined in terms of a failure to inform, the first and simplest form of non per se unfair or deceptive practice is a "[f]ailure to state a material fact if the failure deceives or tends to deceive."⁹⁴ This section departs from the Maryland common law rule that mere silence or nondisclosure of material facts is generally insufficient to constitute actionable fraud.⁹⁵ Under common law theories, a duty to disclose

deceived. The presence of this plural language may mean one of two things. The presence of the word consumers, in conjunction with the capacity or tendency language, arguably evidences a legislative intent to limit subsection (1) to purely public enforcement measures. More plausibly, however, subsection (1), in the absence of express language restricting its scope to public enforcement devices, should be read to require the injured plaintiff to establish that such practice has the capacity to deceive other consumers. In deciding whether a representation has the capacity to deceive, the FTC measures its effect on the average individual. *E.g.*, *Korber Hats, Inc. v. FTC*, 311 F.2d 358, 360-62 (1st Cir. 1962); *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952, 954 (2d Cir. 1960), *cert. denied*, 364 U.S. 827 (1961). Although the claim would not deceive the average consumer, it could deceive a group particularly susceptible to such representations. See note 81 and accompanying text *supra*.

The plural language might be seen as evidence of a legislative intent to adopt a capacity to deceive test for a private cause of action based on this subsection because of a policy favoring enforcement of the Act by "private attorneys general" especially when more than one consumer is affected by an unfair or deceptive trade practice. The absence of capacity to deceive language from other sections, however, in conjunction with language referring to more than one consumer, makes it likely that the capacity to deceive standard is inapplicable to private causes of action. The remedy allowed by § 13-408, in the absence of other indicators of legislative intent, appears to have merely a compensatory, not a deterrent or preventative, function.

94. MD. COM. LAW CODE ANN. § 13-301(3) (Cum. Supp. 1979).

95. See, *e.g.*, *Walsh v. Edwards*, 233 Md. 552, 557, 197 A.2d 424, 427 (1964) (seller of real property not obligated to disclose the undesirable features of property offered for sale, even if nondisclosure relates to material facts; but duty to disclose arises upon active misstatement of fact or partial statement of fact); *Fegeas v. Sherrill*, 218 Md. 472, 474-80, 147 A.2d 223, 225-27 (1958) (nondisclosure of termite damage is insufficient to justify damages or rescission of a contract to purchase a house). Compare *id.* with *Fowler v. Benton*, 229 Md. 571, 185 A.2d 344 (1962), *cert. denied*, 375 U.S. 845 (1963). Defendant represented that the Health Department installed a septic system but failed to disclose the system's inadequacy. The court held that although mere nondisclosure absent some special duty to speak is insufficient to show fraud, a partial statement of facts which could mislead due to an omission may constitute fraud. *Id.* at 582, 185 A.2d at 351. See also *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950) (duty to disclose arises if necessary to cure any misconception that could result from propositions stated); *Alberty v. FTC*, 182 F.2d 36, 43 (D.C. Cir.) (Bazelon J., dissenting), *cert. denied*, 340 U.S. 818 (1950). Under constructions of the FTC Act, examples of the duty to disclose include adequate disclosure of the prior use of a product, *Double Eagle Lubricants, Inc. v. FTC*, 360 F.2d 268, 269-70 (10th Cir. 1965); a danger that might result from the use of the product, *American Medicinal Prods., Inc. v. FTC*, 136 F.2d 426, 427 (9th Cir. 1943); a product's composition if it has been changed, *Royal Baking Powder Co. v. FTC*, 281 F. 744, 748-50 (2d Cir. 1922); or is different than its appearance, *Theodore Kagen Corp. v. FTC*, 283 F.2d 371, 371 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 843 (1961).

is imposed in only a few special instances, such as transactions involving fiduciary relationships.⁹⁶ The rationale is that in ordinary arm's length bargaining situations the purchaser has ample opportunity to ascertain relevant facts.⁹⁷ Consumer protection legislation, however, is predicated on a "recognition of the unequal bargaining power of opposing forces in the marketplace"⁹⁸ and imposes a greater duty of disclosure to compensate for the general inability of consumers to protect themselves against deception.⁹⁹ In order to avoid liability, a representer must not only make careful use of his language, he must also attempt to perceive the consumer's comprehension of a proposed transaction in order to discern when disclosure is required. The representer's burden may be further increased by an assumption similar to that made under the FTC Act, that the relevant standard of comprehension is not that of the traditional reasonable man, but that of the reasonably vulnerable consumer.¹⁰⁰

In order to trigger the disclosure requirements of section 13-301(3), it is necessary that the defendant fail to state a material fact.¹⁰¹ In a common law fraud suit a materiality requirement also must be met.¹⁰² The materiality element in section 13-301(3) can best be explained by comparing it to the causation requirement under section 13-408. Generally, as a matter of causation, a consumer must prove actual reliance upon a representation. To further establish that the representation was of material fact, a consumer must prove that his reliance was justifiable, that a reasonably vulnerable consumer would have acted upon the representation.¹⁰³ The requirement of materiality ensures that insignificant misstatements or omissions are not the basis for a claim for damages or rescission of a contract. Traditionally, a fact is considered "material" if its existence or nonexistence is "a matter to which a reasonable man would attach importance in determining his choice of action in a transaction, or [if] the maker of the representation knows that its recipient is likely to regard the fact as important although a reasonable

96. See, e.g., *Fowler v. Benton*, 229 Md. 571, 581, 185 A.2d 344, 351 (1962); *Fegeas v. Sherrill*, 218 Md. 472, 475-77, 147 A.2d 223, 225-26 (1958).

97. *Fegeas v. Sherrill*, 218 Md. at 477, 147 A.2d at 226.

98. *Commonwealth by Cremer v. Monumental Properties, Inc.*, 459 Pa. 450, 458, 329 A.2d 812, 816 (1974).

99. Courts have recognized the adverse effects of mass media advertising with its "highly developed arts of persuasion." See, e.g., *J.B. Williams Co. v. FTC*, 381 F.2d 884, 890 (6th Cir. 1967).

100. See note 81 *supra*.

101. MD. COM. LAW CODE ANN. § 13-301(3) (Cum. Supp. 1979).

102. *James & Gray II*, *supra* note 4, § 9. Issues of materiality and causation are ignored by the Commission under the FTC Act. If an advertisement is found to be misleading, the Commission need only show capacity to deceive and to affect a purchasing decision. See note 91 *supra*. See also *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 889-90 (6th Cir. 1967).

103. *James & Gray II*, *supra* note 4, § 9.

man would not so regard it.”¹⁰⁴ Construction of the three subsections specifying a materiality requirement¹⁰⁵ should give weight to decisions under the FTC Act recognizing that because it was designed to protect the gullible as well as the cautious,¹⁰⁶ a determination of materiality should depend on the maker's actual knowledge of what is important to the recipient or what would be important to a reasonably vulnerable consumer.¹⁰⁷

104. *Brodsky v. Hull*, 196 Md. 509, 516, 77 A.2d 156, 159 (1950). See *Bobb v. Bolyard*, 194 Md. 603, 609, 72 A.2d 13, 16 (1950) (representation material if without it a transaction would not have taken place). The *Restatement (Second) of Torts* considers a matter material if:

a reasonable man would attach importance to its existence or non existence in determining his choice of action in the transaction in question . . . or . . . the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

RESTATEMENT (SECOND) OF TORTS § 538 (1977).

105. MD. COM. LAW CODE ANN. § 13-301 (3), -301(4), -301(9) (Cum. Supp. 1979). In light of the express requirement of materiality in these provisions of § 13-301, it is possible to infer that this requirement need not be met to establish practices where this term is omitted. In deciding whether to construe the subsections of § 13-301 to contain an implied materiality component when materiality is not explicitly required, due weight should be given to an important policy consideration. Analogizing to common law doctrine, the materiality element in a fraud suit functions to ensure a minimum amount of stability in business transactions. *James & Gray II*, *supra* note 4, § 9, at 500. A claim of fraud or deception may often be made by the dissatisfied party to the transaction, and frequently such disappointments are unrelated to any misrepresentations that may have been made during the course of negotiations. *Id.* Concern for business stability may be given due weight without infringing on the broad purposes of the Consumer Protection Act, because the standard of materiality allows recovery in many instances in which reliance would be deemed to be unjustified under the objective common law standard. See note 80 *supra*.

An element of materiality may be inferred from the nature of the types of unfair or deceptive practices set forth in § 13-301, many of which arguably apply to situations in which representations would likely be inherently material. An example of how the Act differs from traditional concepts of materiality is the liability of a seller for an erroneous estimate of a quantity of land. The Court of Appeals decided in *Brodsky v. Hull*, 196 Md. 509, 77 A.2d 156 (1950), that a quantity of land estimate which differs from true quantity is not material because the buyer had the risk of accuracy. The Act apparently leads to a different result. Section 13-301(2) specifically prohibits a representation that consumer goods, services or realty has a “sponsorship, approval, necessary, characteristic ingredient, use, benefit, or *quantity* which they do not have.” MD. COM. LAW CODE ANN. § 13-301(2)(i) (Cum. Supp. 1979) (emphasis added).

106. See note 81 and accompanying text *supra*.

107. See *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F.73, 75 (2d Cir. 1910). See also *Gulf Oil Corp. v. FTC*, 150 F.2d 106, 109 (5th Cir. 1945); *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944). There are limitations on the extent of the protection offered to the ignorant or feeble-minded under the FTC Act:

True, as has been reiterated many times, the Commission's responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable This principle loses its validity, however, if it is applied uncritically or pushed to an absurd extreme. An advertiser cannot be charged

A second type of non per se unfair or deceptive practice is found in section 13-301(9). This section broadly applies to sales or promotions,¹⁰⁸ and to the "subsequent performance of a merchant with respect to an agreement of sale, lease, or rental."¹⁰⁹ Included within this practice is "[d]eception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same"¹¹⁰ This provision in essence provides a basis for recovery for certain types of representations or omissions that lead a consumer to believe justifiably or expect something is true that is not in fact "true." Not only are the basic elements of the two preceding non per se practices combined — "falsity" and "misleading" — this subsection also includes an element that the representer intend for the consumer to rely on the representation or omission.

It should be recognized that interpretation of the nine preceding unfair or deceptive practices must overcome a certain inherent ambiguity in section 13-301. Section 13-301 is structured as a list of various prohibited practices; each of its subsections constitutes an independent type of a deceptive practice. This structuring suggests that an aggrieved consumer may recover upon proof of any one of nine possible unfair or deceptive practices based on representations or statements. A closer examination of the language of each provision, however, reveals that many of the requisite proof requirements differ according to a particular factual context. If each provision is assumed to embody a legislative response to a particular factual setting, the language chosen by the legislature in imposing various elements of proof in particular fact situations must be assumed to be intentional, and this section should not, if possible, be construed in a manner that would ignore such language. This could result if one of the general provisions of section 13-301 were applied to a fact situation that appears to call for application of a specific subsection with specific elements of proof.

with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it, therefore, an actionable deception to advertise "Danish pastry" when it is made in this country? Of course not. A representation does not become "false or deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.

In re *Kirchner*, 63 F.T.C. 1282, 1290 (1963), *aff'd sub nom.* *Kirchner v. FTC*, 337 F.2d 751 (9th Cir. 1964). See also In re *Papercraft Corp.*, 63 F.T.C. 1965, 1993 (1963). For a critical discussion of the evolution of the "standard of perception" employed by the Commission, see 2 G. ROSDEN & P. ROSDEN, *supra* note 19, ¶ 18.02.

108. MD. COM. LAW CODE ANN. § 13-301(9) (Cum. Supp. 1979).

109. *Id.* § 13-301(9)(iii). Subsection (9) also is directed at "a contract or other agreement for the evaluation, perfection, marketing, brokering or promotion of an invention." *Id.* § 13-301(9)(ii).

110. *Id.* § 13-301(9).

The problem can be seen by contrasting the provisions containing a scienter element with provisions lacking such element. In addition to proof of a false representation with regard to a service or repair, or in the course of an advertisement or offer, subsections 13-301(5) and (7) impose, respectively, intent and knowledge elements. If a consumer is unable to prove the required mental element, recovery will be denied unless section 13-301(1) is given effect.

Deciding which provision should be given effect involves competing considerations. On the one hand, if the broad scope of section 13-301(1) is not given effect, then, contrary to legislative purpose, consumers unable to establish the requisite mental element will be denied recourse against an unfair or deceptive trade practice. On the other hand, if the broad provision is given effect in a situation to which the legislature intended to impose additional specific elements of proof, then such specific provisions will be reduced to surplusage. In view of the fact that this section should be broadly construed to promote its purpose, in the absence of explicit language restricting the scope of section 13-301(1), conflict between the general provision which would allow relief and specific provisions which would deny relief should be resolved in favor of allowing consumer recovery under the general provision. To the extent that a practice contains particularly stringent proof requirements, as section 13-301(9) does, it would appear a fortiori that it too must not be given effect over a provision which would provide a basis for relief.

POSSIBLE LIMITATIONS ON THE SCOPE OF THE PRIVATE CAUSE OF ACTION

The definition of prohibited activity in section 13-301 in terms of "practices"¹¹¹ may, by negative inference, impose a restriction on a consumer's cause of action. Although in the majority of other states¹¹² and

111. *Id.* § 13-301.

112. ALASKA STAT. § 45.50.471 (Cum. Supp. 1979); ARIZ. REV. STAT. ANN. § 44-1522 (1967); ARK. STAT. ANN. §§ 70-904 to -906 (Cum. Supp. 1977); CONN. GEN. STAT. ANN. § 42-110b (West Cum. Supp. 1979); FLA. STAT. ANN. § 501-204 (West Cum. Supp. 1979); IDAHO CODE § 48-603 (1977); KAN. STAT. ANN. § 50-626 (1976); LA. REV. STAT. ANN. § 51:1405 (West Cum. Supp. 1979); MASS. ANN. LAWS ch. 93A, § 2 (1972 & Cum. Supp. 1979); MICH. COMP. LAWS ANN. § 445.903 (Cum. Supp. 1979); MISS. CODE ANN. § 75-24-5 (Cum. Supp. 1978); MONT. REV. CODES ANN. § 85-402 (Cum. Supp. 1977); NEV. REV. STAT. §§ 598.410, 598A.060 (1973); N.H. REV. STAT. ANN. § 358-A:2 (Supp. 1975); N.Y. GEN. BUS. LAW § 349 (McKinney's Cum. Supp. 1979); N.C. GEN. STAT. § 75-1.1 (1975 Repl. Vol.); N.D. CENT. CODE § 51-15-02 (1974); OHIO REV. CODE ANN. § 1345.02 (Page Supp. 1978); PA. STAT. ANN. tit. 73, § 201-3 (Purdon Cum. Supp. 1979); R.I. GEN. LAWS § 6-13.1-2 (1970); S.C. CODE § 39-5-20 (1976 & Cum. Supp. 1978); S.D. COD. LAWS §§ 37-24-5.3 to -24-5.6, -24-6 (1977); TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon Cum. Supp. 1978); UTAH CODE ANN. § 13-11-4 (Supp. 1979); VT. STAT. ANN. tit. 9, § 2453 (1971 & Cum. Supp. 1979); VA. CODE § 59.1-200 (Cum. Supp. 1979); WASH. REV. CODE § 19.86.020 (1978); W. VA. CODE § 46A-6-104 (1976).

in the FTC Act,¹¹³ the term "practice" is used disjunctively with the word "act," Maryland's Consumer Protection Act omits the latter term. It may be that omission of the word "act" from the prohibited trade activity in section 13-301 evidences an intent to narrow the scope of the Act's application. The word "practice" generally connotes repeated or habitual activity and implies uniformity and continuity rather than isolated activity or a single occurrence.¹¹⁴ In construing an unrelated statute, the Court of Appeals of Maryland has held that the term "practice" necessarily implied an act often repeated by the same person, or a succession of acts of a similar kind or like employment.¹¹⁵

If section 13-301 is construed to define prohibited activity that must be more than mere isolated acts, an aggrieved consumer must prove not only that he was damaged by an unfair or deceptive act but also that the defendant pursued the same course of conduct as a matter of practice. Such a construction would allow a potential violator, in effect, one and perhaps more wrongs before liability could be imposed. Indeed, if deceptive acts are outside the ambit of section 13-301, then a person could make use of hundreds of different schemes, so long as each scheme was employed only once. The absurdity of the "practice" limitation lies in the practical necessity of proving not only one's own cause of action, but also a series of other consumers' causes of action as well.

The language of section 13-301 supports the conclusion that the omission of the word "act" should not be construed to preclude a private cause of action for an unfair or deceptive act. The deceptive practices in subsections (1) through (9) are not defined in terms of repeated or continuous activity but rather in terms of single representations or statements; upon proof of one of the prohibited representations, a consumer is entitled to bring a cause of action pursuant to section 13-308.¹¹⁶ In view of the language of section 13-301, and in recognition of the consequences contrary to legislative purpose that would result if the term were construed otherwise,

113. 15 U.S.C. § 45(2)(1) (1970).

114. The term "practice" has been defined as "[r]epeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage." BLACK'S LAW DICTIONARY 1055 (5th ed. 1979).

115. *West v. Sun Cab Co.*, 160 Md. 476, 479, 154 A. 100, 103 (1931) (quoting 3 BOUV. LAW DICT. 2650 Rawles' ed. 3rd rev.). The court interpreted a statute authorizing the Public Service Commission to determine regulations, practices and services with respect to transportation of persons, Code Pub. Gen. Laws art. 23, § 373 (1924), in holding that an order requiring taxicab owners to carry indemnity insurance did not establish a "practice" within the Code.

116. In *Spradling v. Williams*, 553 S.W.2d 143, 146 (Tex. Civ. App. 1977), the court referred to individual prohibited acts under the Texas Consumer Protection Act as instances of deceptive trade practices. See *Bell v. Kent-Brown Chevrolet Co.*, 1 Kan. App. 131, 561 P.2d 907 (1977) (recovery given to consumer against dealer-seller of a van under an act which prohibits deceptive practices).

the term unfair or deceptive "practice" should be read to include isolated acts.¹¹⁷

A second possible limitation on the scope of the Maryland Consumer Protection Act may result from reliance upon decisions rendered under the FTC Act.¹¹⁸ A consumer's right to relief in a private cause of action arguably may be limited by the imposition of a condition precedent that the unfair or deceptive trade practice be against the "public interest."¹¹⁹ The applicability of such a condition raises a fundamental issue of statutory construction — the proper use of section 13-105.¹²⁰ This section, intended to serve as an aid to proper construction of the term "unfair or deceptive practices," states that the General Assembly intended "due consideration and weight be given to the interpretations of section 5(a)(1) of the Federal Trade Commission Act by the Federal Trade Commission and the federal courts."¹²¹ Cases decided under the FTC Act uniformly require the existence of a public interest to justify an agency complaint. In *FTC v. Klesner*,¹²² the Supreme Court first articulated this requirement, explaining that the "mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial."¹²³

Several factors support the conclusion that a public interest requirement should not be read into the Maryland Consumer Protection Act. First, there is no language requiring a showing of public interest in the sections relevant to both private and public remedies offered in the Act. The only possible origin of a public interest condition would be from reliance upon FTC decisions.¹²⁴ The FTC Act, however, is enforceable solely through agency public enforcement mechanisms,¹²⁵ while the Maryland Act combines public enforcement with a private cause of action. This difference provides the basis for understanding why a public interest requirement is justifiably a prerequisite of FTC action, but not of the Maryland consumer's right to

117. A contrary construction would be possible, and might well be necessary, if the Maryland Act provided for only public enforcement mechanisms. Limited resources would be best devoted to prosecution of habitual or repeated violators and would serve the Act's purposes. The statutory direction in § 13-105 to construe "unfair or deceptive trade practices" in a manner similar to the construction of those terms under the FTC Act, given congruity in such a case with the FTC Act, would be likely to mandate the result.

This problem illustrates the difficulties encountered in construing a statute providing for public and private enforcement when the ends to be served by each may differ.

118. 15 U.S.C. § 45(a)(1)(1970).

119. See note 19 *supra*.

120. MD. COM. LAW CODE ANN. § 13-105 (1975); see note 31 and accompanying text *supra*.

121. MD. COM. LAW CODE ANN. § 13-105 (1975).

122. 280 U.S. 19 (1929).

123. *Id.* at 28.

124. MD. COM. LAW CODE ANN. § 13-105 (1975); see note 19 *supra*.

125. See note 19 *supra*.

private relief.¹²⁶ The purpose of the public interest requirement is to ensure that the FTC does not dissipate its limited budgetary resources by attempting to issue complaints against comparatively trivial unfair or deceptive trade practices involving few people and insubstantial amounts of damages.¹²⁷ Such a resource allocation device has no place in an enforcement remedy that makes use of a private cause of action.¹²⁸

Failure to recognize the purpose of the public interest requirement in FTC decisions may explain another jurisdiction's adoption of this requirement for private causes of action under its state consumer protection act. In *Lightfoot v. MacDonald*¹²⁹ the Supreme Court of Washington became one of the first jurisdictions to address the issue whether proof of public interest is prerequisite to relief in a private cause of action under Washington's consumer protection act.¹³⁰ In *Lightfoot*, the plaintiff sued her attorney for failure to properly advise her with respect to a threatened mortgage foreclosure. Because the plaintiff failed to show that her attorney's conduct, which damaged no one but herself, had sufficient impact upon the public, the court held that the complaint had been properly dismissed.¹³¹

In concluding that a showing of "public interest" was required, the court relied on the legislative declaration of purpose in the Washington act and, in accordance with a statutory mandate that construction of the Act be guided by FTC interpretations, on *FTC v. Klesner*.¹³² The court stated that because the purpose of the Act is to "protect the public," the legislature, in providing a private cause of action, intended to further that same purpose.¹³³ Thus, the

126. There is nothing in § 13-408 to indicate that the private cause of action was intended to provide for anything other than an individual's action for his own damages. The language of the section states, "any person may bring an action to recover for injury or loss sustained by him." MD. COM. LAW CODE ANN. § 13-408 (1975) (emphasis added). No specific provision is made for class actions. Although they would presumably not be precluded if otherwise available, the amalgamation of a group of small individual claims may not present an appropriate case for a class action. See MD. R. PROC. 209(a) ("claims of putative class members must present common question of law or fact").

127. *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 877 (2d Cir. 1961) (Friendly, J., dissenting); *Moretrench Corp. v. FTC*, 127 F.2d 792, 795 (2d Cir. 1942).

128. In fact, imposing such a restriction might put further strain on the Division of Consumer Protection to proceed against practices that might otherwise be handled through private action.

129. 86 Wash. 2d 331, 544 P.2d 88 (1976).

130. *Id.* at 335, 544 P.2d at 91.

131. *Id.* at 338, 544 P.2d at 92-93. Under the Maryland Act, attorneys are exempt from liability. MD. COM. LAW CODE ANN. § 13-104(1)(1975).

132. 86 Wash. 2d at 334, 544 P.2d at 90.

133. *Id.* The *Lightfoot* court stated:

[a]n act or practice of which a private individual may complain must be one which also would be vulnerable to a complaint by the Attorney General under the act. A breach of a private contract affecting no one but the parties to the contract . . . is not an act or practice affecting the public interest.

Id. at 334, 544 P.2d at 90. In *Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wash. App. 742, 551 P.2d 1398 (1976), the Court of Appeals of Washington, construing the

Lightfoot court implicitly agreed with the *Klesner* court that the mere fact that private rights should be respected is insufficient to support a finding of public interest.¹³⁴ This construction of the Washington Act also found support in a provision, not found in the Maryland Act, which provides that it "shall not be construed to prohibit acts or practices which . . . are not injurious to the public interest"¹³⁵

A proper construction of the term "unfair or deceptive trade practices" in Maryland's Act should give "due consideration and weight" to interpretations of the FTC Act.¹³⁶ However, to the extent that such interpretations would be inapplicable to the Maryland Act by virtue of the basic differences between legislation providing only public enforcement measures as opposed to both public and private remedies,¹³⁷ as well as

elements of a deceptive practice, appeared to interpret ambiguously the *Lightfoot* public interest requirement by stating, "[t]o constitute a deceptive practice, the advertisement need only have a tendency or *capacity* to deceive a substantial portion of the purchasing public." *Id.* at 748, 551 P.2d at 1403. See *Dempsey v. Joe Pignataro Chevrolet*, 22 Wash. App. 384, 589 P.2d 1265, 1270 (1979), for a similar formulation.

The *Lightfoot* requirement of a public interest precondition to a private cause of action was apparently ignored in *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 554 P.2d 349 (1976), a case in which the court of appeals gave relief to a buyer of a used car. The court sidestepped the issue by stating that the *Lightfoot* court "did not intend to limit private consumer protection actions to only those situations where defendant's actions cause actual injury to numerous consumers." *Id.* at 52, 554 P.2d at 358. However, the court held consistently with *Lightfoot* that an isolated sale of a four unit apartment building was not within the ambit of the act. *Allen v. Anderson*, 16 Wash. App. 446, 557 P.2d 24 (1976). See also *Lookbill v. Mom's Mobile Homes, Inc.*, 16 Wash. App. 817, 559 P.2d 600, 604-05 (1977) (defendant seller failed to properly complete a conditional sales security agreement; such failure was peculiar to the plaintiffs and therefore no basis for private cause of action). In *Salois v. Mutual of Omaha Ins. Co.*, 90 Wash. 2d 355, 581 P.2d 1349 (1978), the Supreme Court of Washington clarified and partially modified its interpretation of the public interest prerequisite to a private cause of action by stating that a private remedy is available if private contracts affect the public interest, and the business of insurance affects the public interest. 581 P.2d at 1352. Thus, plaintiffs' insureds were permitted to recover under the act upon establishing insurer's breach of duty of good faith and fair dealing.

134. 86 Wash. 2d at 334-35, 544 P.2d at 91.

135. *Id.* at 333, 544 P.2d at 90 (quoting WASH. REV. CODE § 19.86.920 (1978)). This provision may well have proved determinative, although the Washington courts may have found a way of affording a private remedy in some cases, see *Salois v. Mutual of Omaha Ins. Co.*, 90 Wash. 2d 355, 581 P.2d 1349 (1978). For examples of interpretations of the private cause of action in state deceptive trade practice statutes without such a restriction, see *Bartner v. Carter*, 405 A.2d 194, 199-201 (Me. 1979) (denying recovery because statute provides only for "restitution," not damages); *Baldassari v. Public Fin. Trust*, 369 Mass. 33, 337 N.E.2d 701 (1975) (no "loss of money or property" alleged).

136. MD. COM. LAW CODE ANN. § 13-105 (1975).

137. Other courts have noted that state statutory provisions for a private cause of action cannot be construed in the same manner as the FTC Act. *E.g.*, *Bartner v. Carter*, 405 A.2d 194, 200-01 (Me. 1979). The Maine statute construed in *Bartner*, modeled on the FTC Act, proscribed "unfair methods of competition and unfair or

inconsistent with the stated purposes of the Maryland Act, specific Maryland statutory purposes should control. The Consumer Protection Act has three major purposes: to set certain minimum statewide standards for the protection of consumers, to bolster the public's undermined confidence in merchants, and to assist the public in obtaining relief from unlawful practices.¹³⁸ Reading a "public interest" requirement into the Act would frustrate these purposes, if individual injured consumers were required to show potential or actual injury to a substantial number of other consumers. Ingrafting a public interest requirement onto a consumer right ignores the fact that individuals are parts of the "public"; to the extent injured consumers are not permitted to obtain relief, public confidence in merchants will continue to be eroded and the enforcement of minimum standards of protection for consumers will be frustrated. Because a public interest requirement is inapplicable to private causes of action and would hamper the statutory purposes, and because there is no language conditioning recovery on proof of this element, such a requirement should not be read into the Act.¹³⁹

EFFECT ON REAL PROPERTY LAW

The Maryland Consumer Protection Act was amended in 1976 to cover consumer real estate transactions.¹⁴⁰ Real estate brokers and salesmen are exempt from its provisions,¹⁴¹ but it likely applies at least to direct sales of consumer homes by developers.¹⁴² Although the effect of the Act's provisions remains to be seen, the Act has the potential of effecting changes in several

deceptive acts or practices," ME. REV. STAT. §5-207 (1979), and stipulated that state courts were to be guided by interpretations of the similar provision of the FTC Act by the FTC and federal courts, *id.* The Maine court noted that although state courts were to be guided by federal interpretations of the FTC Act, the provision of a private cause of action was an "important difference" that precluded resort to federal interpretations in determining the meaning of the substantive provisions in the context of a private suit. 405 A.2d at 200.

138. MD. COM. LAW CODE ANN. §13-102(b) (1975 & Cum. Supp. 1979).

139. The reasoning of the *Lightfoot* court was rejected as untenable in *Singleton v. Pennington*, 568 S.W.2d 369, 371-72 (Tex. Civ. App. 1978) (the *Lightfoot* holding "would be an unwarranted judicial invasion of legislature's primary responsibility to determine the public interest and prescribe remedies for wrongs, both public and private.") (dictum) (on rehearing judgment reversed on other grounds). See *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 322 N.E.2d 768 (1975) (aggrieved individual to a private contract may recover under the Consumer Protection Act).

140. Ch. 907, 1976 Md. Laws 2487.

141. MD. COM. LAW CODE ANN. §13-104(1) (1975).

142. Brokers' principals, even individual sellers, are not excluded by the terms of the Act. A "merchant" includes "a person who directly or indirectly either offers or makes available to consumers any . . . consumer realty," *id.* §13-101(g) (Cum. Supp. 1979), a definition that seems to include all sellers. It seems unlikely, however, that an individual offering his home for sale would be within the purview of the Act. The word "merchant" connotes someone in the business of selling, a connotation likely contemplated by the General Assembly. The statutory provision that refers to erosion

established common law doctrines and statutory provisions relating to real property. Since transactions involving real property are likely to involve substantially greater sums of money than most consumer transactions, private suits may be likely in this area.

Merger Into the Deed

One of the most firmly established common law doctrines involving real property is the merger of contract rights into the deed. This doctrine, which accords finality to real estate transactions, excludes parol evidence for the purpose of "contradicting, adding to, subtracting from, or varying the terms of a deed."¹⁴³ Application of the doctrine raises a *prima facie* presumption, upon acceptance of the deed, that the deed is a final execution of the whole contract. The deed supercedes any original agreement, and all rights and remedies of the parties in relation to the contract must be determined by the deed;¹⁴⁴ all prior negotiations and agreements are excluded from consideration once the deed is signed.¹⁴⁵ The only exceptions to this principle of law arise when the deed is only a partial execution of the contract,¹⁴⁶ or where there is fraud¹⁴⁷ or mistake¹⁴⁸ in the terms and execution of the deed. Due to the limited number of exceptions available under this doctrine, the grantor is generally insulated from liability once the deed is accepted. The Consumer Protection Act, however, appears to have carved out another exception to the traditional rule. The language of the Act provides that a grantor may later be challenged upon the representations (or lack of them) that produced the transaction.¹⁴⁹ As a result, sellers of realty must more carefully consider the legal implications of their conduct, and may no longer find sanctuary in the delivery of the deed.

Perhaps because the doctrine of merger may lead to harsh results, courts have readily found a prior or contemporaneous oral or written agreement to be collateral to and consistent with the deed, and therefore admissible.¹⁵⁰ Examples include provisions for specific improvements¹⁵¹ or the construc-

of public confidence in merchants, *id.* § 13-102(2), also notes that it is likely that most *business people* are honest, *id.* (emphasis added).

It should also be noted that transactions involving the sale of farm land would be included. Consumer realty refers to realty "primarily for personal, household, family, or agricultural purposes." *Id.* § 13-101(d).

143. *Bladen v. Wells*, 30 Md. 577, 581 (1869).

144. *Stevens v. Milestone*, 190 Md. 61, 65, 57 A.2d 292, 293 (1948); *Levin v. Cook*, 186 Md. 535, 539, 47 A.2d 505, 507 (1946); *Buckner v. Hesson*, 159 Md. 461, 464, 150 A. 852, 853 (1930).

145. *Millison v. Fruchtmann*, 214 Md. 515, 518, 136 A.2d 240, 242 (1957).

146. *Laurel Realty Co. v. Himelfarb*, 194 Md. 672, 677, 72 A.2d 23, 24 (1950).

147. *Bladen v. Wells*, 30 Md. 577, 581 (1869).

148. *Buckner v. Hesson*, 159 Md. 461, 150 A. 852 (1930).

149. See MD. COM. LAW CODE ANN. § 13-301 (1975 & Cum. Supp. 1979).

150. See, e.g., *Levin v. Cook*, 186 Md. 535, 47 A.2d 505 (1946); *Rosenthal v. Heft*, 155 Md. 410, 418, 142 A. 598, 602 (1928); *Bryant v. Wilson*, 71 Md. 440, 443, 18 A. 916, 919 (1889).

151. *Stevens v. Milestone*, 190 Md. 61, 57 A.2d 292 (1948).

tion of a house.¹⁵² This judicial mitigation of the rule, however, does not extend as far as the Consumer Protection Act; the common law exception facilitates relief only in cases in which there was an actual agreement.

An examination of the Court of Appeals' decision in *Heckrotte v. Riddle*,¹⁵³ will illustrate the Act's possible amelioration of established precedents. The plaintiffs in *Heckrotte* had purchased a house that — unknown to them — violated the county zoning regulations. In affirming the dismissal of their subsequent complaint, the court held that the purchasers must exercise reasonable diligence to ascertain compliance with the zoning regulations, and that their acceptance of the deed created a prima facie presumption that it was in final execution of the contract of sale, thus determining the rights of the parties.¹⁵⁴ The seller in *Heckrotte* made no statement as to the building's location or compliance with zoning regulations. Under section 13-301(3) of the Consumer Protection Act, failure to state a material fact that "deceives or tends to deceive" may constitute a deceptive practice.¹⁵⁵ Application of this provision to the facts in *Heckrotte* may lead to the conclusions that the seller's silence with respect to zoning regulations constituted a deceptive practice, and that section 13-301 of the Act was intended to displace any common law doctrines that might operate to deny consumers relief with respect to such realty transactions. This conclusion is supported by the language and purpose of the Act and by analogy to the established fraud exception to the operation of the doctrine of merger.

Parol Evidence Rule

The parol evidence rule, a corollary to the merger doctrine, excludes from evidence antecedent agreements introduced for the purpose of varying or contradicting a written agreement.¹⁵⁶ The issue arises as to how a plaintiff may establish his case under section 13-301 if he is a party to a written contract.¹⁵⁷ If the rule is found applicable, a severe restriction will be

152. *Kandalis v. Paul Pet Constr. Co.*, 210 Md. 319, 123 A.2d 345 (1956).

153. 224 Md. 591, 168 A.2d 879 (1961).

154. *Id.* at 595, 168 A.2d at 881.

155. MD. COM. LAW CODE ANN. § 13-301(3) (Cum. Supp. 1979).

156. The parol evidence rule provides that:

Where two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.

3 CORBIN ON CONTRACTS § 573 (1960). For examples of the rule's application in Maryland, see *England v. Universal Fin. Co.*, 186 Md. 432, 47 A.2d 389 (1946); *Markoff v. Kreiner*, 180 Md. 150, 154-55, 23 A.2d 19, 23 (1941).

157. Cases of fraud are excepted from the operation of the parol evidence rule. *Rinaudo v. Bloom*, 209 Md. 1, 9, 120 A.2d 184, 189 (1956). Thus, the question again arises whether the deceptive practices characterized by the Act can be treated similarly to the fraud exception for the purpose of escape from the rule.

ingrafted on the language of section 13-301. As in the case of the merger doctrine, the language and broad remedial purposes of the Act suggest that this common law rule should be inapplicable to actions brought pursuant to the Act. One commentator has considered the problem of construction in the following manner:

The basic difference between this and other areas of law is that the law of unfair and deceptive practices is result oriented. The emphasis is on the relationships between the parties throughout the transaction, including the inducements to enter into an agreement as well as conduct subsequent to the consummation of that agreement. The totality of the relationship between the parties is relevant. The written document purporting to be a contract is no longer of primary importance.¹⁵⁸

Under this reasoning, if the remedial purposes of the Act are to be fulfilled, an action brought under the Consumer Protection Act should be exempt from the parol evidence rule.¹⁵⁹

Statutory Provisions

One area of potential conflict of the Consumer Protection Act with the provisions of the Real Property Article is in the latter's warranty provisions.¹⁶⁰ The most obvious example is the "special warranty," generally provided in the standard form deed. A special warranty is a covenant by the grantor that he will "warrant forever and defend the property to the grantee against any lawful claim and demand of the grantor and every person claiming or to claim by, through, or under him."¹⁶¹ In some deeds, a grantor also provides a general warranty, which "has the same effect as if the grantor had covenanted that he will warrant forever the property to the grantee against every lawful claim and demand of any person."¹⁶² These express warranties, in conjunction with section 2-115 of the Real Property Article, which negates any implied warranties,¹⁶³ provide the basis for all buyer and seller rights and obligations with respect to title.

158. 2 CONSUMER LAW HANDBOOK 115 (1976).

159. A case that could be decided differently if brought pursuant to the Consumer Protection Act is *Delmarva Drill Co., Inc. v. Tuckahoe Shopping Center Inc.*, 268 Md. 417, 302 A.2d 37 (1973), in which the court stated:

Here, the contract was clear and unambiguous on its face and hence, as a matter of substantive law, parol evidence of a prior or contemporaneous promise to supply "usable water" could not be admitted to contradict a written contract providing that "[n]o specific guarantee is given concerning quality of water."

Id. at 426, 302 A.2d at 41. Assurances by the defendants that they would produce usable water could be construed as a false representation of a service under § 13-301(2). MD. COM. LAW CODE ANN. § 13-301(2) (Cum. Supp. 1979).

160. MD. REAL PROP. CODE ANN. §§ 2-105, -106 (1974).

161. *Id.* § 2-106.

162. *Id.* § 2-105.

163. "There is no implied covenant or warranty by the grantor as to title or possession in any grant of land or of any interest or estate in land. However, in a

Regardless of any contractual agreement under the above provisions as to general or special warranties, the Consumer Protection Act could extend an implied warranty of title to real estate transactions. Section 13-301(2) provides that it is an unfair or deceptive trade practice to make a representation that consumer realty has a characteristic that it does not have.¹⁶⁴ Alternatively, section 13-301(3) defines a prohibited practice in terms of "[f]ailure to state a material fact if the failure deceives or tends to deceive."¹⁶⁵ Application of section 13-301 of the Consumer Protection Act might provide consumers with greater protection than appears to exist under the Real Property Article.

Another potential conflict arises with regard to the Statute of Frauds,¹⁶⁶ which requires all contracts with respect to real property to be in writing.¹⁶⁷ Real property contracts are not enforceable unless a writing is produced. Under subsections 13-301(1) and (2) of the Consumer Protection Act, however, a consumer may sue for a false representation concerning consumer realty regardless of whether a writing exists.¹⁶⁸ Alternatively, a consumer could recover for damage sustained as a result of nonacquisition of property offered or advertised, even in the absence of a writing, under subsection 13-301(5), which prohibits advertisement or offer of consumer realty "[w]ithout intent to sell, lease, or rent them as advertised or offered."¹⁶⁹ It remains to be seen, however, whether in light of the language and purpose of section 13-301, the Statute of Frauds will be held inapplicable to suits under the Act.

In addition to the general warranty provisions, the Real Property Article provides for express and implied warranties in connection with the sale of new housing.¹⁷⁰ These warranties, patterned after the Uniform Commercial Code's express and implied warranties,¹⁷¹ protect the purchaser of a home

lease, unless the lease provides otherwise, there is an implied covenant by the lessor that the lessee shall quietly enjoy the land." *Id.* § 2-115.

164. MD. COM. LAW CODE ANN. § 13-301(2) (Cum. Supp. 1979).

165. *Id.* § 13-301(3).

166. MD. REAL PROP. CODE ANN. §§ 5-101 to -108 (1974 & Cum. Supp. 1979). See generally *Cambridge, Inc. v. Goodyear Tire & Rubber Co.*, 471 F. Supp. 1309, 1313 (D. Md. 1979).

167. An exception to this writing requirement is leasehold estates for less than one year. MD. REAL PROP. CODE ANN. § 5-102 (1974).

168. The Act has no explicit requirement that a writing must exist in order to bring an action. Nor does it make sense to imply a writing requirement, since the bulk of real estate transactions would then be unprotected under the Act.

169. MD. COM. LAW CODE ANN. § 13-301(5) (Cum. Supp. 1979).

170. MD. REAL PROP. CODE ANN. §§ 10-201 to -203 (1974 & Cum. Supp. 1979).

171. See MD. COM. LAW CODE ANN. §§ 2-313 to § 315 (1975 & Cum. Supp. 1979). The potential inconsistencies which exist with respect to the Real Property Article implied warranty provisions also exist with these analogous Uniform Commercial Code provisions. It should be noted however, that the Maryland version of the Uniform Commercial Code expressly excludes consumer goods from the provision for exclusion of warranties. *Id.* § 316.1 (1975).

from a defect that either was the "basis of the bargain"¹⁷² or caused the house to be unfit for habitation¹⁷³ or for a particular purpose intended by the purchaser.¹⁷⁴ In *Krol v. York Terrace Building, Inc.*,¹⁷⁵ for example, the Maryland Court of Special Appeals held that the failure of a water well was sufficiently serious to demonstrate a breach of these statutory warranties.¹⁷⁶ In contrast, an element of materiality is omitted from six of the nine unfair or deceptive trade practice definitions based on representations or statements.¹⁷⁷ Even if a materiality requirement is read into section 13-301, it nevertheless is a less stringent standard than that of common law materiality.¹⁷⁸ The Consumer Protection Act could therefore reasonably be read to expand the scope of these warranties, and a seller's liability may be extended to include defects that do not render the home uninhabitable.¹⁷⁹

The Real Property Article provides self-contained packages of rights and remedies with respect to protection of security deposits¹⁸⁰ and mandatory disclosure requirements in connection with the initial sale of condominium units,¹⁸¹ including specific remedies for false statements and omissions of material facts.¹⁸² These provisions were enacted to cover their respective areas fully. If the Act is applicable, however, other instances of incomplete disclosure or other types of misrepresentations may be the subject of liability.

In each of the preceding illustrations of the potential ramifications of the Consumer Protection Act, certain limiting provisions of the Real Property Article may be rendered inapplicable in the area of consumer transactions.¹⁸³ While the Act is not always inconsistent with the Real

172. MD. REAL PROP. CODE ANN. § 10-202 (1974) (express warranties).

173. *Id.* § 10-203(a) (1974 & Cum. Supp. 1979) (implied warranty).

174. *Id.* § 10-203(c) (1974). The particular purpose must have been made known to the seller, and the purchaser must have been relying on the seller's skill. *Id.*

175. 35 Md. App. 321, 370 A.2d 589 (1977).

176. *Id.* at 332, 370 A.2d at 596.

177. See MD. COM. LAW CODE ANN. § 13-301 (Cum. Supp. 1979). For a discussion of the meaning of materiality except with respect to omissions, see text accompanying notes 101 to 107 *supra*.

178. See text accompanying notes 101 to 107 *supra*.

179. The Act is limited to homes which are primarily for personal, household, family, or agricultural purposes, MD. COM. LAW CODE ANN. § 13-01(d) (Cum. Supp. 1979); the Real Property Article warranties apply to all new private dwelling units, MD. REAL PROP. CODE ANN. § 10-201 (1974).

180. MD. REAL PROP. CODE ANN. § 8-203 (1974 & Cum. Supp. 1979).

181. *Id.* § 11-124 (Cum. Supp. 1979).

182. *Id.* § 11-124(e). This section provides that a seller who makes untrue statements of material facts or who omits material facts in the required disclosure is liable to the buyer.

Section 11-119 gives a unit owner or the council of unit owners a cause of action against an owner who fails to comply with the statute or with the required condominium declaration or bylaws. *Id.* § 11-119(a). Damages or injunctive relief may be sought, and the prevailing party is entitled to attorneys' fees. *Id.*

183. It is, of course, quite possible that conflicts between the Act and real property law will be resolved in favor of the latter. A court might find that the General

Property Article, applying it in this area may disrupt the existing nature of business relationships by upsetting the expectations of individuals relying on the limited remedies provided by the Real Property Article. Whether an aggrieved consumer will be permitted to invoke the Consumer Protection Act's remedies in lieu of or in addition to remedies provided by the Real Property Article will ultimately depend on a careful construction and application of the relevant provisions to a concrete factual situation.

CONCLUSION

Despite the absence of appellate decisions construing the Maryland Consumer Protection Act, an analysis of the purpose and language of the statute, in conjunction with interpretations of the FTC Act, provides a framework for, and some insight into, the probable application of the Act and the difficulties which may accompany its application. The enactment of the Consumer Protection Act was a legislative response to the impotence of the consumer to protect himself from many kinds of deceptive practices. In addition to public enforcement provisions, the Act created new substantive rights, and extended old ones, for the consumer by providing a private action for damages. Although the Act has broadened the scope of liability for misrepresentations and has eliminated in most instances the need to establish scienter, obstacles to the achievement of its broad remedial purposes remain. The relatively small amount of damages ordinarily suffered in consumer transactions continue to render a cause of action under the Act uneconomic.¹⁸⁴ Although creation of a private cause of action may

Assembly did not intend to disturb long-settled principles such as warranty of title, but only to prevent sharp practices in unconsummated consumer real estate sales.

184. See Eovaldi & Gestrin, *supra* note 19. This deficiency could be corrected by amending the Act to allow awards of reasonable attorneys' fees, as do forty jurisdictions. See ALASKA STAT. § 45.50.531(d) (Supp. 1979); ARK. STAT. ANN. § 70-927(b) (Supp. 1977); CAL. BUS. & PROF. CODE § 17082 (West 1964); COLO. REV. STAT. § 6-1-113 (1973); CONN. GEN. STAT. ANN. § 42-110(g) (West Cum. Supp. 1979); D.C. CODE ANN. tit. 28, App. § 6(k) (Supp. V 1978); DEL. CODE tit. 6, § 2501 (1975); FLA. STAT. ANN. § 501-210 (West Cum. Supp. 1979); GA. CODE ANN. § 106-703(b) (1968); HAWAII REV. STAT. § 481 A-4 (1976); IDAHO CODE § 48-608(3) (1977); ILL. ANN. STAT. ch. 121½ § 313 (Smith Hurd Cum. Supp. 1979); IND. CODE ANN. § 24-5-0.54(a) (Burns Cum. Supp. 1978); KAN. STAT. § 50-634(e) (Cum. Supp. 1978); KY. REV. STAT. § 367.220(3) (Cum. Supp. 1978); LA. REV. STAT. ANN. § 51:1409(A) (West Cum. Supp. 1979); ME. REV. STAT. tit. 10, § 1213 (Cum. Supp. 1978) MASS. ANN. LAWS ch. 93A, § 9 (1972); MICH. COMP. LAWS ANN. § 445.911 (Cum. Supp. 1979); MINN. STAT. ANN. § 325.773(2) (West Cum. Supp. 1979); MISS. CODE ANN. § 75-24-15(2) (Cum. Supp. 1978); MO. ANN. STAT. § 407.025(1) (1979); MONT. REV. CODE ANN. § 85-408(3) (Cum. Supp. 1977); NEB. REV. STAT. § 87-303 (1976); N.H. REV. STAT. ANN. § 358-A:10(I) (Supp. 1975); N.J. STAT. ANN. § 56:8-19 (West Cum. Supp. 1979); N.M. STAT. ANN. § 57-12-10(c) (1978); N.C. GEN. STAT. § 75-16.1 (1975); OHIO REV. CODE ANN. § 1345.09(F) (Page Supp. 1978); OKLA. STAT. ANN. tit. 78, § 54(b) (1976); OR. REV. STAT. § 646.638(3) (1977); PA. STAT. ANN. tit. 73, § 201-9.2 (Purdon Cum. Supp. 1979); R.I. GEN. LAWS § 6-13.1-5.2(d) (Cum. Supp. 1978); S.C. CODE § 39-5-140(a) (1976); TENN. CODE ANN. § 47-18-109(e) (1979); TEX. BUS. & COM. CODE ANN. tit. 2 § 17.50(c) (Vernon Cum. Supp. 1978); UTAH CODE ANN. § 13-11-19(5) (Supp. 1979); VT. STAT.

make it more attractive for consumers to protect themselves against unfair or deceptive practices, uncertainty as to its application has in the past slowed its effectiveness as a viable consumer remedy. Although this Comment has attempted to provide a framework for a proper interpretation of the Act, the precise scope of the legislation remains unclear.

ANN. tit. 9, § 2461(b) (Cum. Supp. 1979); VA. CODE § 59.1-204(B) (Cum. Supp. 1979); WASH. REV. CODE ANN. § 19.86.090 (1978); WIS. STAT. ANN. § 425.308 (1974); WYO. STAT. § 40-109 (Cum. Supp. 1975).

To meet the criticism that allowance of attorney fees would encourage many groundless suits, a provision could be drafted that would allow attorneys fees to prevailing defendants when the action brought by the plaintiff was "spurious or brought for harassment purposes only." See IDAHO CODE § 48-608(3) (1977). Among the various state consumer protection acts that allow private remedies, 17 states permit multiple damages, 11 permit punitive damages, and 14 states allow minimum statutory damages. See SHELDON & ZWEIBEL, State UDAP Statute Characteristics Chart in DEPT. OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., NATIONAL INSTITUTE OF LAW ENFORCEMENT & CRIM. JUSTICE, SURVEY OF CONSUMER FRAUD LAW 122 (June 1978).

